

STATE OF NORTH CAROLINA

**BEFORE A STATE HEARING REVIEW OFFICER
FOR THE STATE BOARD OF EDUCATION
PURSUANT TO G.S. 115C - 109.9**

Student by parent Father

Petitioner

v.

Granville County Board of Education

Respondent

DECISION

11 EDC 0703

This is an appeal of the Decision of Chief Administrative Law Judge Julian Mann III issued on May 10, 2011. The Petitioner combined the appeal of this case with the appeal of 11 EDC 1459 and 11 EDC 2219 which were all heard consecutively on the same day and had the same title. A separate Decision was written for each case by Judge Mann. A review Decision is also being provided for each case.

The records of the case received for review included:

1. Transcript of Preliminary Hearing on March 7, 2011 to Dismiss and/or Continue this case and cases 11 EDC 1459 and 11 EDC 2219.
2. Transcript of Preliminary Hearing on April 18, 2011 to Continue this case and cases 11 EDC 1459 and 11 EDC 2219.
3. Transcript of the hearing on May 3, 2011 on the Motion for Summary Judgment. Separate transcripts were made for the hearings on May 3, 2011 on the Motion for Summary Judgment for cases 11 EDC 1459 and 11 EDC 2219.
4. The Official Record of the case issued by the Office of Administrative Hearings; which included the Decision of Judge Mann, motions, procedural documents, and orders.
5. Additional written arguments submitted to the Review Officer.

Preliminary Hearings for this case was held before Chief Administrative Law Judge Julian Mann III on March 7, 2011 and April 18, 2011 in Oxford, North Carolina. Judge Mann then held a Hearing on a Motion for Summary Judgment on May 3, 2011 in Oxford, North Carolina.

Appearances:

For Petitioner *Father*, *pro se*; North Carolina

For Respondent James E. Cross, Jr. and Dale W. Hensley; Royster Cross & Hensley, LLP;
PO Drawer 1168, Oxford, North Carolina 27565

To provide a document that does not have personally identifiable information regarding the Petitioner and/or for convenience, the following will be used to refer to the parties:

For the Child/Petitioner - *Student*; the child

For Parent/Petitioner - *Father*; Petitioner; parent; father

For Respondent - Respondent; Granville County Schools; LEA

ISSUES

The issue for the hearing was whether the Respondent should be granted Summary Judgment. The Respondent, in a Motion for Summary Judgement, stated that there were no genuine issues of material fact to be decided in a full hearing on the Petitioner's Petition.

The Petitioner's Petition had included four (4) issues:

1. Failure or refusal to give parent access to educational records, including any tests or reports.
2. Failure to notify or provide any information in regard to testing.
3. Failure or refusals to schedule an IEP Meeting.
4. Failure or refusals to provide a Free Appropriate Education.

LIST OF WITNESSES

There were no witnesses for either party. The hearing consisted solely of oral arguments.

EXHIBITS

There were no exhibits entered during the hearing by either party. The Respondent's Motion for Summary Judgment, with attachments, and the Petitioner's Response, with attachments, were the focus of the arguments during the hearing.

PRELIMINARY STATEMENT

Judge Mann's decision was appealed by the Petitioner on May 17, 2011 and the undersigned was appointed as Review Officer on May 20, 2011. The parties were provided a Request for Written Arguments on May 20, with Written Arguments due on June 7, 2011. The Decision was to be completed by June 16, 2011, within the 30 day timeline established by 34 CFR 300.515(b) and the *Policies Governing Services for Children with Disabilities*, NC 1504-1.16(b).

Standard of Review by the State Review Officer

The review of this case is in accordance with the provisions of G.S. 115C-109.9 and the *Policies Governing Services for Children with Disabilities*, NC 1504-1.15. The standard of review that must be used by the Review Officer for the State Board of Education is found in *Board of Education v. Rowley*, 458 U.S. 176 (1982). The Supreme Court held that due weight shall be given to the state administrative proceedings. In *Doyle v. Arlington County School Board*, 953 F.2d 100 (4th Cir. 1991), the Fourth Circuit explained *Rowley's* instruction that "due weight" be given to state administrative hearings. *Doyle* reviewed a product of Virginia's two-tiered administrative system. The court first noted, "By statute and regulation the reviewing officer is required to make an independent decision . . ." *Doyle*, 953 F.2d at 104 The court held that in making an independent decision, the state's second-tier review officer must follow the "accepted norm of fact finding."

In North Carolina, District Court Judge Osteen further interpreted this requirement of *Rowley* and *Doyle*. *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, Memorandum

Opinion and Order 1:05CV818 (M.D.N.C. November 18, 2008) A State Review Officer (SRO) must follow the same requirements as the courts. The SRO must consider the findings of the ALJ as to be *prima facie* correct if they were regularly made. An ALJ's findings are regularly made if they "follow the accepted norm of fact-finding process designed to discover the truth."

Having reviewed the records of the case, the Review Officer for the State Board of Education independently makes Findings of Fact and Conclusions of Law in accordance with 20 U.S.C. 1415(g); 34 CFR §300.532; N.C.G.S. 115C-109.9; and the *Policies Governing Services for Children with Disabilities*, NC 1504-1.15.

The Review Officer finds that the ALJ's Facts are regularly made. The Review Officer's Findings of Fact are consistent with those of the ALJ. The Review Officer concurs with and uses many of the ALJ's Facts. Some Facts concerning the ALJ's Hearing and Decision have been added. The overall impression one gets when reading the ALJ's Facts and the Review Officer's Facts is the same. Some of the Review Officer Conclusions of Law are stated differently but are consistent with those of the ALJ and supported by IDEA, Federal Regulations, and state law. None of the Conclusions reached by the Review Officer are inconsistent with those of the ALJ. To the extent that the Findings of Facts may contain Conclusions of Law, or that the Conclusions of Law may include Findings of Fact, they should be so considered without regard to the given labels.

FINDINGS OF FACT

1. The Petitioner, *Father*, is a resident of Granville County and the father of *Student*. At the time of the hearing *Student* was nine years old and was in the fourth grade at S Elementary School in Granville County.

2. The Respondent is a local education agency (LEA) receiving funds pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.*, (IDEA) and is responsible for providing special education to the child pursuant to Article 9, Chapter 115C, of the North Carolina General Statutes.

3. *Student* has been identified as a child with a disability, categorized as having a Serious Emotional Disability (SED). He has Attention Deficit Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD). As such, he is eligible for and requires special education and related services, including an Individualized Education Program (IEP) pursuant to state and federal law.

4. The Petitioner filed a petition for a due process hearing on January 21, 2011, alleging Respondent failed or refused to allow Petitioner access to educational records, tests, and reports; failed or refused to notify or provide information in regard to testing; failed or refused to schedule an IEP meeting; and failed to provide FAPE.

5. A Preliminary hearing on Motions for Dismissal and Continuance was conducted by Chief Administrative Law Judge Julian Mann III in Oxford, North Carolina on March 7. Continuance was granted. The Respondent filed a Motion for Summary Judgment on April 8. On April 15 the Petitioner filed a Motion to Continue. On April 18 a preliminary hearing was held regarding the Respondent's Motion for Summary Judgment and the Petitioner's Motion to Continue.

The ALJ continued the hearing until May 3, at which time arguments concerning the Respondent's Motion for Summary Judgment would be heard.

6. On May 3, 2011 the ALJ held hearings on the Motion for Summary Judgment on this case as well as cases 11 EDC 1459 and 11 EDC 2219. The purpose of this hearing was to determine if there were genuine issues of material fact that needed to be decided in a hearing or whether the Respondent's Motion for Summary Judgment should be granted.

7. Based on the Petition, Respondent's Motion with supporting affidavit, Petitioner's documents in response, and arguments by both parties, specific facts in this case could be determined.

8. On January 14, 2011 the Petitioner *Father* requested to have access to educational records. The requested records were copied and *Father* was notified that he could retrieve the copies at the Granville County Schools Central Office. The Petitioner was afforded additional opportunities to inspect the educational records by contacting school personnel to arrange a time for such review. He never did so.

9. An assisted technology evaluation had been requested at the November 22, 2010 IEP meeting. *Father* signed consent. The Respondent arranged for a speech therapist and occupational therapist to conduct evaluations. At the time the Petition was filed, the therapists were in the process of completing their written summaries. The written summaries had not yet been submitted to the Respondent.

10. During the hearing, the Petitioner argued that he was not involved in the evaluation. Except for giving consent, a parent is not usually involved in an assisted technology evaluation.

11. Federal Regulations clearly state that IEP meetings must have a purpose. The Petitioner requested an IEP meeting but did not want to specify a reason or purpose. The Petitioner and Principal were in communication regarding the scheduling of an IEP meeting as soon as the assisted technology evaluation was completed so that the results could be discussed. The Petitioner finally stated that he wanted a meeting to discuss the behavioral contract. The Petitioner's consultant, however, had stated that it was not necessary to have an IEP meeting just to make a minor modification to *Student's* Behavior Intervention Plan (BIP). Also, the BIP was the issue of a due process hearing (10 EDC 8869) pending in the Office of Administrative Hearings.

12. Petitioner's Petition gave no specifics regarding the failure to provide FAPE. Several due process petitions had previously been filed pertaining to this issue (10 EDC 5398 and 10 EDC 8864). The first was dismissed and the second was decided in Respondent's favor. These cases are incorporated herein by reference.

13. In the Petitioner's Response to the Motion for Summary Judgment, the Petitioner provided no specific facts contrary to those included in the affidavit attached to the Motion.

14. In arguments during the hearing on the Motion for Summary Judgment, the Petitioner introduced no specific facts or other evidence that countered the Respondent's Motion. The Petitioner merely presented allegations and denials.

15. The issues in the Petitioner's Petition as well as arguments during the hearing are the same, or substantially the same, as those in previous due process hearings. The Petitioner had not been successful in any of the prior cases.

16. Judge Mann issued a Final Decision on May 10, 2011, stating:

The undersigned Chief Administrative Law Judge finds and holds that there are no genuine issues as of any material fact and Respondent is entitled to judgment as a matter of law. Respondent's Motion for Summary Judgment is GRANTED. Therefore, the Undersigned finds that Respondent's IEP and placement of Petitioner A.J. was appropriate to address Petitioner A.J.'s needs so as to provide him with FAPE in the least restrictive educational environment. The Petitioners are not entitled to nor are they granted any other relief.

17. Judge Mann's decision was appealed by the Petitioner on May 17, 2011 and the undersigned was appointed as Review Officer on May 20, 2011. The parties were provided a Request for Written Arguments on May 20.

18. The Parties submitted Arguments to the Review Officer on June 7, 2011.

Based on the Findings of Fact, the Review Officer for the State Board of Education makes Conclusions of Law independently of those of the ALJ. They are consistent with those of the ALJ. A few are essentially the same, but many utilize law not included in the ALJ's Decision. Those added are consistent with IDEA, state law, federal regulations, state policies, and court interpretations. The Review Officer makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings and the Review Officer for the State Board of Education have jurisdiction over this case pursuant to Chapters 115C, Article 9 of the North Carolina General Statutes (N.C.G.S.); NC 1500 *Policies Governing Services for Children with Disabilities*; the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. §1400 et seq.; and IDEA's implementing regulations, 34 C.F.R. Part 300.

2. IDEA was enacted to "ensure that all children with disabilities have available to them a Free Appropriate Public Education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. §1400(d)(1)(A), IDEA; the implementing federal regulations, 34 C.F.R. Part 300; N.C.G.S. 115C, Article 9; and NC 1500 *Policies Governing Services for Children with Disabilities*. All these provisions have specific procedures that a LEA must follow in making FAPE available.

3. Respondent is a local education agency receiving funds pursuant to 20 U.S.C. §1400 et seq. and the agency responsible for providing educational services to students enrolled in Granville County. The Respondent is subject to the provisions of applicable federal and state laws and regulations, specifically 20 U.S.C. §1400 et seq.; 34 C.F.R. Part 300; N.C.G.S. 115C, Article 9; and the North Carolina *Policies*, NC 1500. These acts and regulations require the Respondent to provide FAPE for those children in need of special education.

4. *Student* is a child with a disability for the purposes of IDEA, 20 U.S.C. §1400 et seq. and a child with special needs within the meaning and definition of N.C.G.S. 115C-106.3(1). *Student* was enrolled in Respondent's school during the period relevant to this controversy. Being classified as having a serious emotional disability, he is entitled to a free appropriate public education (FAPE) from the Respondent.

5. N.C.G.S. 115C, 109.6-109.9 and the *Policies* (NC 1504, 1.8-1.16) provide the guidelines to be used in the hearing and administrative review process. The hearing by the ALJ and review by this Review Officer are required to be conducted in accordance with these provisions.

6. The North Carolina Rules of Civil Procedure provide that a party against whom a claim is sought may move at any time for summary judgment. N.C.G.S. 1A-1, Rule 56(b)

7. The ALJ had authority to grant summary judgment pursuant to N.C.G.S. 1A-1, Rule 56; N.C.G.S. 150B-36(d); 26 N.C.A.C. 03.0101; and 26 N.C.A.C. 03.0115. Summary judgment is properly granted when there is no genuine issue as to any material fact and the party is entitled to a judgment as a matter of law. This eliminates the need to hold a formal hearing to determine the facts. N.C.G.S. 1A-1, Rule 56

8. The initial burden regarding a Motion for Summary Judgment is on the moving party:

On a Motion for Summary Judgment, the moving party has the burden of establishing the lack of any triable issue of fact. *Draughon v. Harnett County Bd. of Education*, 158 N.C. App. 208 (1985). The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of her claim. The trial judge must view the presented evidence in a light most favorable to the non-moving party. *Dobson v. Harris*, 352 N.C. 77 (2000)

9. The burden then shifts to the non-moving party:

Once the party seeking summary judgment makes the required showing, the burden shifts to the non-moving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial. *Gaunt v. Pittaway*, 139 N.C. App. 778 (2000). When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. N.C.G.S. 1A-1, Rule 56(d)

10. In addition to the burden Petitioner has under N.C.G.S. 1A-1, Rule 56, the Supreme Court in *Schaffer v. Weast*, 546 U.S. 49 (2005), stated that parents who challenge educational decisions made by schools have the burden of proof in due process hearings. Thus, the Petitioner has the burden to show that the Respondent's Motion for Summary Judgment should be denied.

11. The Respondent provided significant and substantial evidence that it gave Petitioner access to educational records, provided information regarding A.J.'s evaluation, discussed scheduling IEP meetings, and otherwise provided FAPE. Once the Respondent had done this in showing that there was no genuine issue as to any material fact, the Petitioner failed to respond as required by N.C.G.S. 1A-1, Rule 56. The Petitioner's assertions, pleadings, and argument cannot and did not satisfy the Petitioner's burden to show a genuine issue of fact.

12. The ALJ properly concluded that that the Respondent met the threshold burden of showing no issue of fact and the Petitioner failed to counter with specific facts at issue. It was appropriate for the ALJ to grant the Motion for Summary Judgment.

13. A significant portion of the Petitioner's pleadings and arguments concerned issues that have been previously settled and adjudicated in due process hearings. The ALJ properly concluded that the Petitioner cannot re-litigate these issues.

14. The Petitioner, acting *pro se*, tried to argue that he should not be held to the same requirements as an attorney. It is true that a *pro se* parent is given more leeway and flexibility in the process. In the end, however, the parent must still enter specific facts and make substantial

arguments to support the Petition. There is no doubt that there are some substantial issues with regard to the education of *Student*, but the Petitioner did not meet the required burden of showing that the Respondent failed in its responsibilities under the law.

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned enters the following:

DECISION

The Review Officer holds that the ALJ did not err in his decision to grant Summary Judgment for the Respondent. There were no genuine issues of material fact to be decided in a hearing. The Petitioner failed to adequately respond to the Motion for Summary Judgment and did not set forth specific facts showing that there are genuine issues of material fact requiring a full hearing. The Petitioner is not entitled to any relief.

This the 13th day of June, 2011

Joe D. Walters
Review Officer

NOTICE

Any party aggrieved by this Decision may institute a civil action in state court within 30 days after receipt of this Decision as provided in G.S. 115C - 109.9 or file an action in federal court within 90 days as provided in 20 U.S.C. §1415. Please notify the Exceptional Children Division, North Carolina Department of Public Instruction, in writing of such action so that the records for this case can be forwarded to the court.